No. 15,629.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

LOUISE L. COBIN,
Appellant,

vs.

MIDLAND MUTUAL LIFE INSURANCE COMPANY,
a Corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

APPELLANT'S REPLY BRIEF.

LEONARD HORWIN,
HORTENSE STAHL,
121 South Beverly Drive,
Beverly Hills, California,
Attorneys for Appellant.

ERICH AUERBACH,
Of Counsel.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Errata in Appellant's Opening Brief 1

Preliminary Comment 2

Comment on Appellee's Statement of the Case 4

Comment on Appellee's Summary of Argument 15

Reply to Appellee's Argument—Point I 15

A. The Material Findings Are Not Supported by Any Substantial Evidence 15

B. Mr. Cobin's Policy Was Never Cancelled by Appellee in His Lifetime 26

Reply to Appellee's Argument—Point II 29

A. The District Court's Rulings As to the Evidence Were Clearly Prejudicial 29

Conclusion 31

Table of Cases

Bloom v. *Pacific Mutual Life Ins. Co.*, 85 Cal. App. 419, 496 ..... 20, 30

Centennial Ins. Co. v. *Schneider*, 247 F. 2d 491, 494 21

Culley v. *N. Y. Life Ins. Co.*, 27 Cal. 2d 187, 194 13

Herbert v. *Lankershim*, 9 Cal. 2d 409 16

Pierce v. *Black*, 131 Cal. App. 2d 521, 525 16

Randall v. *Hunter*, 66 Cal. 512 22

Ransom v. *Penn. Mutual Life Insurance Co.*, 43 Cal. 2d 420, 425 13

Traders & General Ins. Co. v. *Champ*, 225 F. 2d 802 806 28

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I.

ERRATA IN APPELLANT'S OPENING BRIEF.

At the outset we respectfully request this Court to correct the typographical errors which inadvertently crept into Appellant's Opening Brief.

At page 20, the figure "$50.50" which appears on line 4 of the second full paragraph on that page, should read "$59.50".

At page 24, the reference to page 33 of the Reporter's Transcript, which appears in the third paragraph on that page, should read "R. 32, lines 10-20".

II.

PRELIMINARY COMMENT.

It shall be appellant's purpose in this brief to answer and comment on points raised in Appellee's Brief in the order in which they are stated therein.

After a prefatory comment on Appellee's Brief, Appellant shall (1) summarize the arguments for and against all points made by Appellee in order that the effect of the mistakes as to the facts in Appellee's Statement of the case, and in Appellee's misconception of the law, may be manifested; (2) Review the evidence which demonstrates from the record, that the judgment is accounted for by the errors complained of; and (3) review the law cited in Appellee's Brief to show there exists no authority to support the affirmance of a judgment obtained as a result of findings repugnant as to the facts and irreconcilable with the principles of the law of insurance.

In its "Summary of Argument" (Appellee's Brief p. 24), Appellee taxes Appellant with what it asserts to be an attempt to classify all of the issues raised on this appeal as legal ones. It contends that the only questions of law involved are whether the District Court erred in its admission of evidence. With respect to all other issues, Appellee seeks sanctuary in the time-honored and frequently argued principle (often asserted, as in the case at bar, unjusti-

fiably) that there is substantial evidence to support the various findings challenged.

But it is fundamental that it is always a question of law whether or not there is substantial evidence to support a finding.

A careful scrutiny of Appellee's Brief discloses that the heart and marrow, the very bone and sinew of its argument in favor of an affirmance of the judgment, rests upon its attempt to justify the lower court's unwarranted finding that Mr. Cobin applied for a standard rate policy but that his offer for such a policy was rejected by Appellee when it issued to him a rated policy, a counter-offer, under Appellee's theory of the case, which Mr. Cobin failed to accept.

If this crucial finding cannot stand, and indeed it cannot, as will be demonstrated, because it lacks any substantial evidence to sustain it, then the elaborate structure which Appellee has fabricated in its brief to uphold the judgment, is clearly bottomed upon the faulty sub-structure of an unsupportable finding, flimsily buttressed by the incompetent and inadmissible testimony improperly received by the trial court and given illusory shape by the application of untenable principles of contract law in the field of insurance.

In this latter connection, it is appropriate to remark, that contrary to Appellee's oft-repeated assertions, Appellant has not ignored the fact that "an insurance policy is nothing more than a contract" (Br. p. 3). To the contrary, in the organization of her argument for reversal, Appellant has adhered rigidly to the classic principles of contract law.

However what Appellant has done, has been to focus the attention of this Honorable Court on the unique dimensions of contract jurisprudence when considered in the context of insurance law, dimensions which, lamentably, have been ignored by the lower court in rendering its judgment, and by Appellee in its argument before this tribunal.

III.

COMMENT ON APPELLEE'S STATEMENT OF THE CASE.

A reading of the record in this case, demonstrates beyond peradventure, that counsel for Appellee was able to lead the trial judge, the Hon. Thurmond Clarke, so far into the bramble bushes that he was unable to grasp the central core of this case. In the same artful fashion, Appellee has composed a disingenuous statement of the case which adroitly turns the eye away from crucial and compelling facts by glossing over the evidence which exposes the fallacy of its position and by dwelling upon a solid phalanx of extraneous evidence erroneously admitted below.

A vital flaw, which threads its way like a leitmotif in all the variations on the theme sounded in Appellee's Brief, begins on page 9 thereof, where Appellee blandly asserts that "it was Mr. Cobin's desire to make application to Midland Mutual for a standard non-rated policy".

Here lies the original infirmity, compounded throughout Appellee's Brief when it iterates time and again that Appellant has begged the question by assuming as true that Mr. Cobin applied for a rated policy which in fact was issued to him. We therefore beg the Court's indul-

gence as we meticulously review the evidence on the subject, not from the mouth of Appellant, nor from evidence stemming from any witness produced on her behalf, but from the very facts adduced from Appellee's witnesses, from the internal evidence of documents prepared by it and its representatives, and from the acts and conduct of its representatives and itself before any dispute arose in this case. Those facts, which overwhelmingly negative the Court's finding, and which compel a new judgment to be entered consistent with those facts, are these:

When Mr. Bloome, Appellee's agent, called at the home of Mr. and Mrs. Cobin with the insurance applications, he knew that all of the insurance policies owned by Mr. Cobin carried a rating and that the best Mr. Cobin had been able to do, was, shortly theretofore, to have some of his policies improved from a lower rating to an A rating (R. p. 29, l. 1—p. 130, l. 5). When Bloome arrived at the Cobin home he had his rate book with him (R. 208, ll. 18-21). Furthermore he had, previously to his arrival, computed the amounts of the premiums required for both Mr. and Mrs. Cobin and knew what they were (R. 211). *Bloome figured that Mr. Cobin's premium was to be $69.52 per month and told him so at the house* (R. 217, ll. 7-10). He himself entered the figure of $69.52 as Mr. Cobin's monthly premium on the Agent's Certificate on the reverse side of Part I of Mr. Cobin's application upon returning to his office. (R. 214, ll. 8-13). He *likewise knew that if Mr. Cobin had applied for a standard rate policy, his monthly premium would have been only $59.50* (R. 221, ll. 3-7).

Bloome himself incorporated into line 11 of Part I of Mr. Cobin's application, the following statement: "Present rating on most recent policy Sub-standard A."

Upon discovering at the house that Mrs. Cobin was born a year later than he had originally thought, he re-computed her premium and found it to be $57.50 per month (R. 140, l. 15—p. 146, l. 16). In asking for a deposit of $130.00 to cover both premiums, Bloome testified: "As long as I had *a couple of dollars extra* in the check to cover the premium, I did not take the time to figure it out to the exact figure". (R. 150, ll. 17-20). The simple addition of Mr. Cobin's premium of $69.52 and Mrs. Cobin's correct premium of $57.50, which gives a total of $127.02, shows that the payment of $130.00 gave Bloome the "couple of dollars extra" he wanted for the policies, computed at standard rates for Mrs. Cobin and on a rated basis for Mr. Cobin.

From these facts standing alone, the conclusion would be inescapable that Mr. Cobin applied and paid for a rated policy and that he was charged a sum, apparently erroneously, slightly in excess of the $66.00 which was the correct premium for the policy he applied for. Had Mr. Cobin applied for a standard rate policy, the total premium for Mr. and Mrs. Cobin would have been $117.00, and Mr. Bloome would not have needed a payment of $130.00 to get "a couple of dollars extra".

But these facts do not stand alone. They are fortified by other evidence from Appellee's own sources. The record shows that Bloome's superior, Mr. Van Elgort, testified in his deposition, that the premium collected by Bloome from

Mr. Cobin was $69.52 (R. 301, ll. 19-25), and that as a consequence there was an over-payment of $3.25 (R. 303, ll. 5-6). Then comes the following revealing testimony from Mr. Van Elgort: "May I add something to that. One of the reasons why the odd amount of premium was collected *is because he was expecting a sub-standard policy*" (R. 303, ll. 19-21).

It is now abundantly clear that Mr. Cobin applied for a policy rated below standard, depositing an advance premium that covered such a rating, with a little overage, and that Bloome and Van Elgort expected a rated policy to be issued, and charged a premium therefor.

The record shows that as a consequence, as soon as the rated policy as issued by Appellee's Home Office, was received by Van Elgort, Cobin's advance payment was immediately remitted to Appellee's home office from Van Elgort's Trust Account (R. 294, ll. 2-7). Clearly if Appellee's attempt to argue that the Home Office had rejected the policy and was merely making a counter-offer, corresponded to the truth of the matter, why should Van Elgort have remitted the premium to the Home Office before determining whether Cobin would accept the alleged counter-offer. Van Elgort's action is utterly incompatible with any legitimate contention that an acceptance of a counter-offer was required by Mr. Cobin.

One inference and one alone, may be drawn from these facts, namely that Bloome and Van Elgort both knew that the policy was issued as applied for and that is why Van Elgort sent Cobin's premium deposit to the Home Office at once. No further action was needed on Mr. Co-

bin's part. A contract was already in force, Mr. Cobin was insured, the premium belonged to Appellee and was therefore remitted to it.

And Bloome was instructed simply to deliver the policies since they had been paid for.

Bloome himself testified that when he delivered the policies to Mr. Cobin, there was no issue of whether the rating was unsatisfactory (R. 235, ll. 1-9).

But even these significant facts do not stand alone. They are fortified by other evidence from Appellee's own sources. Thus, by way of giving the final lie to the spurious and specious contention that Appellee's Home Office rejected the application, and that its issuance of a rated policy constituted a counter-offer, reference is made to the Memorandum dated February 11, 1954, from H. E. Brown, Appellee's Home Office Insurance Underwriter, to Fred Stewart, Manager of Appellee's Policy Records and Premiums Collection Division (R. 23, ll. 19-21). That Memorandum, which bears the very date the policy was issued, was received as Plaintiff's Exhibit 9, and states in its material part with reference to the applications of Mr. and Mrs. Cobin: "We have now been able to complete these applications and *they have been approved today* * * *" (Emphasis added). This admission is completely at variance, and irreconcilable with Appellee's repeated fiction that the application was modified in the Home Office by the endorsement entered on line 19 thereof. For how could the Home Office have *approved* an application for a standard rate policy concurrently with the issuance of a policy with a rated endorsement? Brown's memorandum

to Stewart conclusively establishes that the Home Office approved Mr. Cobin's application for a rated policy and that on that very day, issued such a policy to him. Had the application been for a standard rate policy, it could not have been *approved* concurrently with the issuance of a rated policy.

All of this evidence emanating from Appellee itself, namely that Bloome told Mr. Cobin that his premium was $69.52 (not $59.50, which was the standard rate), Van Elgort's testimony that Bloome was "expecting a sub-standard policy", Van Elgort's remission of the premium to the Home Office immediately upon receipt of the policy as issued, and Brown's statement to Stewart that the application was approved (not modified, or rejected), furnishes conclusive proof that the policy was issued as applied for. It strips away the whole pretentious facade of Appellee's argument that no policy was ever in force on Mr. Cobin's life.

Finally by way of climactic refutation of such a contention, the attention of this Court is invited to Defendant's Exhibit M, Appellee's own policy record card, which reveals the history of Mr. Cobin's policy. It contains the notation "lapsed March 10, 1954" and "Termination March 10, 1954", which is a time subsequent to the passing of Mr. Cobin.

Seldom in the course of a trial is a litigant fortunate enough and privileged to have the benefit of evidence of such convincing probative force from his adversary in support of his position.

We may now advert further to the contents of Appellee's "Statement of Facts".

At the bottom of page 10 of its Brief, Appellee refers to the language of the deposit slips (Defendant's Exhibits A and B). The language therein is interesting. It notes that the deposit is received "upon the condition that if the company shall determine that the application was, as of the date hereof, acceptable according to its customary standards, the company will then put into force the insurance applied for *and the deposit shall thereupon be applied toward payment of the first premium on such policy* * * *" (Emphasis added). That the policy was issued as applied for, appears from the fact that it was approved at the Home Office and from the further fact that Van Elgort, immediately upon receipt of the rated policy for Mr. Cobin, sent his deposit to Appellee as *"payment of the first premium on such policy"*.

At page 12, Appellee refers to the fact that the figure of $69.52 on line 20 of the application, was filled in by the cashier. But Bloome had earlier told Mr. Cobin at his home, that his premium was $69.52 (R. 217, ll. 7-10), and he himself filled in that figure on the Agent's Certificate on the back of Part I of the application (R. 214, ll. 8-13). The slight mistake in the premium is perhaps a reflection on Bloome's mathematical ability, but does not detract from the fact that Mr. Cobin was paying for a rated policy. He did not pay less than the premium for a rated policy—he paid slightly more through the arithmetical error of Appellee's agent.

The whole history of Mr. Cobin's delay in taking his medical examinations, which Appellee stresses on pp. 12-14 of its Brief, has no relevance since he took the examination and a policy was issued. It is but an example of the Court's reception of utterly irrelevant matter and is part of the prejudicial error with which this case is tinged.

The extensive references to the testimony of Mr. Koff and Mr. Grosten, at pp. 14-16, most of which relates to incidents before the issuance of the policy, merely emphasizes again the errors in the admission of such evidence below.

Furthermore if the Court will examine the transcript of the testimony of Mr. Koff and Mr. Grosten, it will be observed that their testimony had little, if anything, to do with the policy from Appellee, which was a straight life policy, bought by Mr. Cobin for the benefit of his widow and children. The policy which Mr. Cobin carried with Manhattan Life Insurance Company was a partnership policy, bought by and made payable to the National Pipe and Steel Company to permit that partnership to buy out the interests in the company of Mr. Cobin's widow in the event of his death (R. 190-192). Cobin never discussed Appellee's policy with Grosten (R. 194, ll. 11-16). However, as indicated, all of this testimony was improperly received in flagrant violation of the hearsay and parol evidence rules. Furthermore, as has been pointed out in Appellant's Opening Brief at p. 55, and pp. 68 and 69, all of that evidence was entirely outside any issue in this case.

On page 17 Appellee makes a highly misleading reference to question 12 of the application form. Appellee as-

serts "Nothing was stated in this space in either policy indicating that any other than the usual non-rated policy was being applied for * * *". However, Appellee fails to mention that nothing in question 12 calls for mentioning any desired rating, whereas Line 11 does mention a rating specifically. Furthermore the testimony of Mr. Bloome on this subject is enlightening:

> "Q. Now, is it a fact, Mr. Bloome, that the statement 'Preferred Life to 85' refers only to the fact that it is an ordinary life insurance contract which is issued in minimums of $10,000?
>
> "A. That is correct.
>
> "Q. And that that term has no reference whatsoever to the rate?
>
> "Mr. Duque: Do you mean rate or the rating?
>
> "Mr. Horwin: The word rating is better, standard and substandard.
>
> "The Witness: That is correct." (R. 140, ll. 4-14).

The reference on page 17 to Appellee's endorsement on line 19 of the application, proves nothing, since the reference to such Class A is merely confirmation of acceptance of the very class mentioned in line 11 of Mr. Cobin's application (R. 136, l. 22—p. 137, l. 1 and R. 248, ll. 13-17). The fact that the company sees fit to mention such classification, when it is accepting something other than a standard rate, does not establish a counter offer. The endorsement would have significance only if line 20 of Mr. Cobin's application, and line 19 of the Agent's Certificate on the reverse side thereof, showed that a premium had been paid at a standard rate, which is not the case here. Furthermore Brown's memorandum to Stewart on February 11,

1954, the date the policies were issued to Mr. and Mrs. Cobin, showed that both Mr. Cobin's and Mrs. Cobin's applications were approved. In short the application of Mr. Cobin, both by reference to his substandard rating and the amount of premium shown, indicates a substandard policy was applied for, even without regard to the previous testimony which has been alluded to, which shows this to have been the case. None the less if there is conceivably any ambiguity in the application, it was of Appellee's own making, and under well established principles of construction, would have to be construed against the insurer. *Ransom* v. *Penn Mutual Life Insurance Co.*, 43 Cal.2d 420, 425, *Culley* v. *N. Y. Life Ins. Co.*, 27 Cal.2d 187, 194.

It is not true, as Appellee asserts on page 20, that Appellant's original complaint denies a meeting with Bloome in February; the pleading of the ultimate fact that the policy remained with the company, has nothing to do with whether or not there was a meeting with Bloome and no reference whatsoever is made thereto in her original complaint. However, it is not amiss to refer to the fact of Appellee's own contradictory position, when it denied in its original Answer that Bloome had ever delivered the policies to Mr. Cobin, notwithstanding Bloome's admission that he had physically delivered them. Likewise, it is not true that appellant changed her position with regard to the meeting of February 19, 1954. Her prior complaint pleaded that the policy remained in Bloome's possession whereas by means of the facts alleged in the Affidavit of Leonard Horwin, her counsel, it was merely sought to

amend the complaint to complete and correct the facts with respect to the delivery of the policies, which were disclosed both by Bloome and Appellant in their respective depositions. It may be said that it is Appellee who was inconsistent, if not worse, in omitting to disclose in its original Answer that Bloome had in fact delivered and left the policies with Mr. Cobin.

The whole fabric of Appellee's story of its "policy cycles" on page 21, which seeks to minimize the fact that it mailed out a notice of premium on March 9, 1954, four days after Mr. Cobin died, is left in shreds by the simple fact that at the end of the alleged cycle, Appellee itself set out on its final record card of March 10, 1954 (Defendant's Exhibit M), that the policy was terminated on March 10, 1954, and struck out the prior references to "not taken March 3, 1954".

The references at pp. 22 and 23 to subsequent conversations between Appellant and Bloome are of no moment. After Mr. Cobin's death, Appellant placed the matter in the hands of her attorney and immediately turned over to him the correspondence of March 30, 1954 and April 16, 1954, which she received from Appellee (R. 400, ll. 8-17). She also turned over to him the refund check of $130.00 which she received from Appellee in the latter part of April, 1954, without cashing it (R. 402, ll. 13-20). That check, of course, has never been cashed.

IV.

COMMENT ON APPELLEE'S SUMMARY OF ARGUMENT (Page 24).

It is significant that at the trial, Appellee expressly disclaimed that any issue of cancellation existed in the case. Appellee's counsel, Mr. Duque, represented as follows to the trial judge:

> "Contrary to what Mr. Horwin has said, there is no legal issue in the case as to a cancellation. Our defendant's position is that there was never a contract; therefore there can be no issue of cancellation. In other words there was never an acceptance of delivery by the Applicant of the contract, and therefore, there could be no contract, and therefore, there is no issue of cancellation involved in this case" (R. 32, ll. 10-17).

In its Summary of argument, Appellee now offers cancellation as an alternate ground of affirmance, for appellee has become apprehensive of its original position. It is doubtful whether at this late stage Appellee is entitled to avail itself of this defense, threadbare and untenable as it is under the factual circumstances here presented in the light of the controlling principles of law.

V.

REPLY TO APPELLEE'S ARGUMENT—POINT I.

A. The Material Findings Are Not Supported by Any Substantial Evidence.

At pages 25 and 26, Appellee seeks refuge in venerable principles of law binding on appellate courts, which, however, are not germane in the situation here presented.

An appellate court is not required to abdicate its intelligence by rubber stamping findings which fly in the very teeth of the evidence. On the contrary the reviewing court must examine the evidence upon which the fact finder has predicated his determination, and if, in the circumstances of the case, as developed by the evidence, it points irresistibly to but one reasonable conclusion, then the issues presented are determined as questions of law. *Pierce* v. *Black,* 131 Cal. App. 2d 521, 525.

This rule is given cogent expression in *Herbert* v. *Lankershim,* 9 Cal.2d 409, where the Court states at pages 471-472:

> "We have stated the evidence as strongly in plaintiff's favor as the record will warrant and we have made an extended review of the evidence because of the often applied rule that an appellate court will not interfere with the judgment entered by a fact-finding body when there exists a substantial conflict in evidence. This rule, however, does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence.
>
> "* * * There must be more than a conflict of mere words to constitute a conflict of evidence. The contrary evidence must be of a substantial character, such as reasonably supports the judgment as applied to the peculiar facts of the case. The rule announced in *Morton* v. *Mooney et al.,* 97 Mont. 1 (33 P. 2d 262),

correctly states the rule which has been approved by this court in a number of our decisions. It thus stated:

> " 'While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court (*Grant* v. *Chicago, etc., Ry. Co.*, 78 Mont. 97 (252 Pac. 382)), and in determining this question "the credulity of courts is not to be deemed commensurate with the facility and vehemence with which a witness swears." It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude the judgment.' "

In support of its claim that there was substantial evidence to support the challenged findings that Mr. Cobin applied for a policy to be issued at standard rates, and that the policy issued by Appellee was different from the policy applied for, Appellee states at page 28, that Bloome testified Mr. Cobin wanted a standard rate policy. At p. 29 it asserts that questions 12 and 18 of Part I of the application, does not indicate that anything more than a standard policy was called for. This in essence is the sum total of the "substantial" evidence to "support" the trial court's findings.

Turning first to the contention that Questions 12 and 18 are paragraphs which would reflect statement of rating, an examination of those paragraphs reveals that nothing therein calls for the indication of a rating. On the contrary Bloome specifically testified that paragraph 12 has nothing to do with the rating (R. 140, ll. 4-14). So far as concerns Paragraph 18, nothing in the words "special

request" suggests a rating. As the author of the document, Appellee could surely have drafted it to suggest that a rating was called for therein. Furthermore Bloome did incorporate in the application in Line 11, the fact that Mr. Cobin carried rated insurance, and Question 20 of Part I and Line 19 of the Agent's Certificate showed that a premium was paid on a rated basis.

At page 28, Appellee asserts that Bloome's statement that Mr. Cobin desired a standard policy, created a conflict in the record. However the basic conflict that it creates is with Bloome's own testimony. For example, at page 30, seeking to neutralize the thrust of Appellant's argument that the premium on a standard rate policy on Mr. Cobin would have been $59.50, Appellee asserts that the charge of $69.52 received by Bloome, was not a charge for the first month's anticipated premium. But Bloome's own testimony is that when he came to the Cobin household, he had already computed Mr. Cobin's premium at $69.52 and told him so (R. 217, ll. 7-10). This unmistakably shows that neither Bloome nor Cobin had a standard rate policy in mind. Bloome's own testimony impeaches and negatives the argument that the application was made for a standard rate policy. It also negatives the lame explanation on page 3, about Mr. Bloome's not wanting to spoil a sale because of the late hour, in requesting the payment of $130.00. This explanation has no validity for two reasons: to begin with the only recomputation involved was Mrs. Cobin's premium, since Bloome told Mr. Cobin his premium amounted to $69.52. Secondly, Bloome testified he wanted "only a couple of dollars extra",

$130.00 being a couple of dollars over the sum of $69.52 and $57.50, Mrs. Cobin's recomputed premium.

It is clear from a reading of the material set out on pages 27-34, of Appellee's Brief, that far from detailing any substantial evidence to support the findings, Appellee has concerned itself largely with a vain endeavor to refute the evidence which negatives those findings.

To recapitulate, this evidence, all of which derives from Appellee itself, shows:

1. Bloome's incorporation into the application of a reference to Mr. Cobin's most recent policy as being rated.

2. Bloome computed Mr. Cobin's premium at $69.52, telling him this was his premium, and entered it on the Agent's Certificate, despite the fact that he knew from his rate book that a standard rate premium was $59.50.

3. Van Elgort's testimony that Bloome expected the issuance of a substandard policy (R. 303, ll. 5-6).

4. The memorandum from Brown to Stewart on February 11, 1954, the day the policies were issued, stating the applications were *approved*. This is exactly and diametrically opposite to Appellee's present contention that it merely counter-offered when issuing the policy.

5. Van Elgort's immediate transmittal of the $130.00 deposit to the company when Cobin's rated policy was received by him, consistent only with the fact that the policy was issued as applied for and that no further act by Mr. Cobin was contemplated.

6. Bloome's delivery of the policy to Cobin, and leaving it with him, with no discussion at all about the rating.

7. The company's policy history card (Defendant's Ex. M) which shows the policy was terminated on March 10, 1954.

In the light of this evidence, there is no force to Appellee's suggestion on page 29, that the Home Office endorsement in paragraph 19 of the Application, converted an acceptance and approval of a policy application accompanied by the transmission of the premium, into a mere counter offer.

And in the face of this overwhelming evidence, drawn entirely from Appellee's sources, can it be legitimately urged that there is any substantial evidence to support the findings?

At pages 32-33, Appellee refers to Van Elgort's request in a letter to Appellee for the return of the premium from Appellee when he learned Mr. Cobin had refused to accept the policies (Deft's. Ex. I). This letter was objected to as a self-serving declaration, hearsay and inadmissible under the rule of *Bloom* v. *Pacific Mutual Life Ins. Co.*, 85 Cal. App. 419, 496, where the Court points out: "* * * it is self evident that statements and letters passing between a principal and an agent in support of a defendant's contentions do not constitute evidence against a third party, * * *"

It is another conspicuous illustration of the prejudice suffered by Appellant from the Court's promiscuous reception of improper evidence, and the incompetent char-

acter of the evidence relied on by Appellee in support of the judgment.

Appellant most earnestly submits that the facts demonstrated by the evidence from Appellee's own sources and witnesses, which have been hereinabove referred to, so overwhelmingly overcome and outweigh anything produced to the contrary, that the support necessary to the finding challenged is not only insubstantial but non-existent. More than ever is it apparent that the language of this honorable Court, speaking through Judge Bone, in *Centennial Ins. Co.* v. *Schneider*, 247 F. 2d 491, 494, is here germane:

> "Under Rule 52 (a) of the Fed. Rules Civ. Proc., 28 U.S.C.A., a finding is clearly erroneous when, although there is evidence to support it, a reviewing court on reviewing the entire evidence is left with a definite and firm conviction that a mistake has been made (Citations).
>
> "After a complete study of the evidence we are left with the conviction that a mistake has been made."

At page 34, Appellee refers to the Court's finding that Mr. Cobin refused to accept the policy, and returned the same for cancellation. It is significant to note, however, that if no contract of insurance had ever been created, there would have been nothing to cancel. The term "cancellation" is a word of art and the use of that term in the findings is in irreconcilable conflict with the finding that no contract was created because the application was not accepted as applied for.

It is elementary that findings must be consistent with each other. If findings are irreconcilable, the Court will

not attempt to harmonize them. See *Randall* v. *Hunter*, 66 Cal. 512. When findings upon material issues are inconsistent or contradictory, it is rudimentary that the judgment is deemed unsupported by the findings.

But regardless of the contradiction reflected in the Court's findings, the evidence which Appellant has previously set out, and which is too clear to be gainsaid, unerringly indicates that a contract came into force when the company approved the application, issued the policy and received and retained at all times the premium in payment thereof which had been deposited by Mr. Cobin.

These facts being established by the most unequivocal evidence, the authorities and argument contained at pages 23-32 of Appellant's Opening Brief, apply with compelling force to the case at bar and are absolutely controlling. Appellant does not desire to unduly extend this Brief by reproducing the material therein contained. Appellee's attempt to diminish the force of such argument, and to distinguish the cases cited, is clearly nugatory.

The muddled logic inherent in Appellee's position, is expressed with singular clarity at page 38 of its Brief, where it cites authorities to the effect that an insurer has no right to retain a premium submitted with an application where it issues a policy differing from the one specified in the application. Is it not then apparent that General Agent Van Elgort's transmittal of the premium from his trust fund to Appellee, upon receipt of the policy from the Home Office, constitutes the most emphatic expression of his understanding that the premium was earned and belonged to the company because the application was ap-

proved and accepted as made? And this conduct, together with the company's memorandum that the applications were approved and the issuance of the policies, is in harmony with the language of the deposit receipt which provides in part "that if the company shall determine the application was, as of the date hereof, *acceptable according to its customary standards,* the company will then put into force the insurance applied for, and *the deposit shall thereupon be applied toward payment of the first premium on such policy* * * *" (Emphasis added).

It is unnecessary to further belabor the significance of this evidence.

At page 44 Appellee urges: "If it is true as the District Court found, that Mr. Cobin refused to accept the policy, for whatever reason, it is equally true that the policy was not in force at the time of his death".

This, of course, is a complete *non sequitur* for it assumes that both physical delivery of the policy and Mr. Cobin's acceptance was necessary to create a contract. But that is not the law.

The authorities cited at page 25, *et seq.,* of Appellant's Opening Brief, which contain Federal, California and Ohio authorities, establish the proposition that where an application is made for a policy of life insurance, and a sum of money is paid to an agent of the insurer to be applied on the first premium, if the insurer accepts the application, the contract is complete on the issuance of the policy and no delivery of the policy to the insured, nor acceptance of the policy by him, is essential to make a contract of insurance binding.

This is precisely the situation in the case at bar. The trial judge failed to recognize the basic principle that that insurance contract sprang into force upon the acceptance of the application by the insurer, and that no further act on Mr. Cobin's part was necessary to lend vitality to the contract.

However in the present case not only was there payment of a premium deposit with the application, approval of the application by the insurer, and issuance of a corresponding policy, but there was also delivery of the policy to the agent, concurrent transfer of the insured's premium from the agent to the insurer, and actual physical delivery of the policy to the insured which was kept by him for several days.

It is thus manifest that the Court's findings rest upon the fallacious notion that the parties were still in the process of negotiating a contract of insurance at the time the policy was issued.

The testimony cited by Appellee at pages 44-46, is suggestive of what partly contributed to the trial judge's errors in the case at bar, namely the reception by him of improper, irrelevant and immaterial evidence. The testimony referred to is cited by Appellee in support of the finding that Mr. Cobin refused to accept the policy offered him. The irrelevance of such a fact, assuming it to be true, has already been pointed out since the contract was made when Mr. Cobin's application was accepted and the policy issued; personal delivery to him and acceptance of the policy by him was unnecessary to the formation of a contract. Any refusal to accept and the return of the pol-

icies, could only amount to an offer to cancel which Appellee never accepted nor consummated in Mr. Cobin's lifetime.

The testimony of Mr. Bloome that Mr. Cobin did not take his physical examination for 7 weeks was objected to (R. 103, l. 8, p. 104, l. 15) because Mr. Cobin did in fact take his examination and his application was approved.

The testimony of Mr. Koff, cited by Appellee, relates to a period prior to the time Mr. Cobin took his physical examination, namely in the Fall of 1953 or at the beginning of 1954 (R. 164, ll. 4-5) whereas Mr. Cobin took his physical examination on January 28, 1958 (Ptff's. Ex. 2).

At the bottom of p. 45, Appellee alludes to a meeting in February, 1954, between Mr. Grosten and Mr. Cobin in the office of Mr. Cobin's counsel, in a manner which is grossly misleading. It seeks to suggest that Appellee's policy was the subject of discussion at such meeting. However Mr. Grosten specifically testified that Appellee's policy was never discussed at that meeting (R. 194, ll. 17-24). Mr. Grosten testified he was little concerned about Appellee's policy (R. 184, ll. 18-19). In fact a reading of Mr. Grosten's testimony discloses that he met Mr. Cobin on only one occasion (R. 179, ll. 24-25), that a $56,000 term insurance policy was placed through his agency on Mr. Cobin's life (R. 180, ll. 10-11), that the buyer and beneficiary thereof was National Pipe and Steel Co., a partnership, and that the meeting in February, 1954, was for the purpose of discussing a buy and sell agreement among the stockholders of National Pipe and Steel Co., to enable the

company to buy out the stock interest of any deceased partner (R. 190-194). A reading of Mr. Grosten's testimony clearly indicates that the Manhattan Life Ins. policy had nothing to do with the Midland Mutual Life Ins. policy. The company was the beneficiary under the Manhattan policy, while Mr. Cobin's widow and children were his beneficiaries in the second policy. The object of the Manhattan policy was to provide a means by which the company could buy out the widow's interest in the company; the object of the Midland policy was to provide insurance for Mr. Cobin's widow and children. The Manhattan policy was on a term insurance plan; Midland was a straight life policy.

In short, not only was the evidence cited on pages 44-46 improperly received, but, as pointed out in detail at pages 68-69 of Appellant's Opening Brief, the collective weight of this and other improper evidence, was prejudicial to Appellant, vitiated the trial and contributed significantly to the decision arrived at below.

B. Mr. Cobin's Policy Was Never Cancelled by Appellee in His Lifetime.

Appellant has set forth at length, at pages 32-42 of her Opening Brief, the argument and authorities which completely nullify any contention that Appellee cancelled Mr. Cobin's policy before his death.

As has been previously indicated, Appellee disclaimed at the trial that there was any issue of cancellation in this case. It now, belatedly, suggests at pages 47-50, that the policy was in fact cancelled at Mr. Cobin's request. In

support thereof, it states at page 48, that when the words "Not Taken March 3, 1954" were stamped on the policy by Mr. Stewart (R. 325, ll. 8-10), the policy was effectively cancelled. This contention is without merit for at least five reasons:

1. As has been pointed out at pages 57-63 of our Opening Brief, this testimony was inadmissible as a self-serving declaration and violative of the hearsay rule.

2. More important, however, is the fact that Mr. Stewart had no authority to cancel policies. The evidence shows that Mr. Stewart was Appellee's *Manager* of the Policy Records Division and *Supervisor* of the employees maintaining policy history cards (R. 318, ll. 15-23). *As a Manager and Supervisor he had no authority to cancel the policy.* The policy provides under title "General Provisions and Benefits", on page 2, as follows:

> "Limitation of Authority: *This policy cannot be varied or altered or its conditions waived or extended in any respect by written agreement of the Company,* signed by the President, a Vice President, the Secretary, an Assistant Secretary, or the Actuary, whose authority in this respect shall not be delegated" (Emphasis added). "No agent, employee, *supervisor or manager,* has power on behalf of the Company to * * * discharge this or any other contract of insurance * * *" (Emphasis added).

3. Appellee mailed to Mr. Cobin a notice of premium on March 9, 1954, four days after his death.

4. Appellee's own policy history card (Deft's. Ex. M) shows that the words "Not Taken March 3, 1954" were

stricken out and there was printed thereon "Lapsed March 10, 1954" and "Termination March 10, 1954".

5. Appellee never refunded Mr. Cobin's premium in his lifetime and made no attempt to do so until April 16, 1954. The failure to return an unearned premium, the failure of the insurer to give notice of cancellation, the request for premium from the insurer mailed on March 9, 1954, and the insurer's own policy record card which shows that the policy was treated as lapsed on March 10, 1954, and not terminated until that date, all unequivocably establish that the policy was in full force on March 5, 1954, when Mr. Cobin died.

It is imperative to remember that the requirement that a notice of cancellation be given to the insured to render the cancellation effective, is indispensable. This is clearly pointed out by this honorable court in the case of *Traders & General Ins. Co.* v. *Champ,* 225 F. 2d 802, where the Court stated (p. 806): "We are satisfied the trial court was correct under the California law in holding the cancellation here ineffective, at least prior to receipt of actual notice."

At page 805, this Court also observes: "Parenthetically, we think if it were ours to decree, there would be no harm in a rule of law that no notice of cancellation (where there was no fraud on the part of the insured) could be effective until it reached the insured, provided the insured had left open the channels of communication to him and had not removed himself an unreasonable distance away."

The significance of Appellee's failure to return the premium is fully discussed at pages 39-42 of Appellant's Opening Brief and will not be repeated here.

At page 51, Appellee attempts to explain away the significance of Appellee's policy history card, showing that the policy terminated on March 10, 1954. There is nothing in the record cited by Appellee to support its statement that this merely indicated the date on which its Accounting Department received notice of Mr. Cobin's alleged refusal to take the policy. Furthermore the card itself (Deft's. Ex. M), is a clearly written statement of the history of Mr. Cobin's policy and any employee's attempt to explain away such a statement, is self-serving and hearsay evidence and inadmissible, and subject to the motion to strike which the Court improperly denied (R. 370, ll. 14-22, p. 371, ll. 7-15).

The card itself, being an admission against interest, was of course, admissible.

VI.

REPLY TO APPELLEE'S ARGUMENT—POINT II.

A. The District Court's Rulings As to the Evidence Were Clearly Prejudicial.

1. Appellant has already cited in detail the many instances in which the Court received evidence in violation of the parol evidence rule (Appellant's Opening Brief, 46-55), and will not repeat that material or the authorities cited in support thereof.

2. At page 53, Appellee asserts that the record reveals that Mr. Grosten testified only to conversations he had with Mr. Cobin. That is patently untrue. Mr. Grosten was permitted to testify to conversations that he had with Mr. Orland, the Manager of his agency (R. 181, l. 23, p. 182, l. 11). Furthermore the complete irrelevancy of Mr. Grosten's testimony appears from his own statement that his discussions with Mr. Cobin did not concern Appellee's policy (R. 184, ll. 8-19).

Thus *C.C.P. 1870,* referred to at page 54, has absolutely no application in this context.

Appellee's attempt to justify the objectionable testimony received from Mr. Van Elgort completely disregards the rule that Appellant is entitled to use admissions against interest but that Appellee is barred by the hearsay rule as indicated in *Bloom* v. *Pacific Mutual Life Ins. Co.,* 85 Cal. App. 419, 496, from attempting to introduce proof of uncommunicated intra-company acts, customs or practices.

3. Appellant has fully set out at pages 57-63 of her Opening Brief, the character of evidence given by Mr. Fogg and Mr. Stewart and incorporates by reference herein, her objection to such testimony as replete with hearsay, conjecture and surmise, self-serving declarations, proof of customs unknown to and uncommunicated to Mr. Cobin and otherwise improper evidence. The trial court made absolutely no effort to comply with the well established principles of the law of evidence but permitted Appellee the widest latitude in injecting into the case evidence of the most incompetent character.

4. It would be a work of supererogation to comment in detail on various other examples of erroneous rulings made by the trial court. This has been done in the material contained in pages 64-69 of the Opening Brief and we respectfully urge the court to consider this material in connection with the erroneous rulings previously cited.

Appellant is confident that this court will recognize how prejudicially to Appellant's interests the Court permitted the facts to be developed below.

CONCLUSION.

The stark incontrovertible facts taken from Appellee's own sources cannot be repelled by the sophistry or fallacious reasoning embodied in Appellee's Brief, for squirm and hedge and evade and weasel as much as the facile minds and legal ingenuity of its able counsel has permitted, Appellee cannot hide the compelling facts that demonstrate that a miscarriage of justice took place in the courtroom of Judge Thurmond Clarke that this tribunal must not permit to remain unrectified.

It is respectfully submitted that the prevailing principles of law, when applied to the facts of this case, show:

1. That Mr. Cobin applied for a rated policy, that he was charged for a rated policy, that he paid a premium based on a rated policy and that Bloome and Van Elgort expected a rated policy to be issued.

2. That Appellee approved Mr. Cobin's application by a written memorandum and issued its policy.

3. That Van Elgort immediately remitted the premium to Appellee which at all times retained said pre-

mium and Bloome physically delivered the policies to Mr Cobin.

4. That at no time while Mr. Cobin was alive, did Appellee notify him the policy was cancelled, nor communicate to him any cancellation of the policy nor return his premium.

5. That no legally effective cancellation of the policy ever occurred in Mr. Cobin's lifetime but on the contrary a notice of premium due was mailed to Mr. Cobin on March 9, 1954.

6. That the policy was in full force and effect, and fully paid for, when Mr. Cobin died on March 5, 1954, and that the insurer's own policy record card showed that the policy did not lapse or terminate until March 10, 1954.

7. That Mr. Cobin's widow, appellant herein, is entitled to recover on the within complaint as beneficiary under said policy.

For the foregoing reasons it is respectfully requested that this Court reverse the judgment of the trial court and direct that a judgment be entered for Appellant.

Failing reversal of the judgment, with direction to enter judgment for appellant, the judgment should be reversed and the cause remanded for a new trial.

Respectfully submitted,

LEONARD HORWIN and
HORTENSE STAHL,
Attorneys for Appellant.

ERICH AUERBACH,
Of Counsel.